



STATEMENT OF

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PRESIDENT
PROFESSIONAL SERVICES COUNCIL

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INTEGRATION AND
OVERSIGHT
AND
SUBCOMMITTEE ON EMERGENCY PREPAREDNESS, SCIENCE AND
TECHNOLOGY

COMMITTEE ON HOMELAND SECURITY

HEARING ON

“HELPING BUSINESS PROTECT THE HOMELAND: IS THE DEPARTMENT OF
HOMELAND SECURITY EFFECTIVELY IMPLEMENTING THE SAFETY ACT?”

SEPTEMBER 13, 2006

Chairman Rogers and Chairman Reichert, members of the Subcommittees, thank you for the invitation to testify on the implementation of the “Support Antiterrorism by Fostering Effective Technologies (SAFETY) Act, part of Title VIII of the Homeland Security Act of 2002 (P.L. 107-296). My name is Stan Soloway, president of the Professional Services Council (PSC). PSC is the leading national trade association of the government professional and technical services industry. PSC’s more than 200 member companies represent small, medium, and large businesses that provide the full range of services to all federal agencies, including information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific, environmental services, and more. Many of our member companies have applied for coverage under the Act or are planning to do so.

As you know, the SAFETY Act provides incentives for the development and deployment of anti-terrorism technologies by creating a system of risk management and litigation management. PSC and our member companies were involved in the congressional action leading to the enactment of the SAFETY Act and we have been actively working on the implementation since then. Significant progress has been made in the last few months to bring the SAFETY Act forward and we compliment the Department of Homeland Security staff, in particular the leadership from the General Counsels’ Office and the Office of the Chief Procurement Officer, particularly for bringing us to this point. More work remains to be done, however, and PSC plans to offer our expertise and support to build on the progress that has been made.

I have divided my testimony into four parts: the regulatory foundation, the application kit, DHS staff support for the SAFETY Act, and addressing the procurement process.

The Regulatory Foundation

On June 8, 2006, the Department published the final rule implementing the Act,¹ replacing an interim rule issued in October 2003.² While PSC recognized the challenges facing the new Department in implementing the SAFETY Act, we were critical of many elements of the interim regulations. We commented extensively on those interim regulations,³ and urged the Department to address numerous issues as it developed their final regulations. We are very pleased that, in the final regulations, the Department addressed most of the concerns we raised. As the background statement accompanying the final regulation noted:

The SAFETY Act program is now in its third year, and the Department has a substantial record of program performance to evaluate. While the Department concludes that the Department’s core legal interpretation of the Act’s provisions are fundamentally sound, experience in administering the program has demonstrated that certain of the procedural processes built to administer the Act can be improved.⁴

When the final regulations were issued, we said then and reiterate today that they were a critical step forward and give clear guidance to Department of Homeland Security officials, other

¹ 71 F.R. 33147, et seq. (June 8, 2006).

² 68 F.R. 59684, et. seq. (October 16, 2003).

³ See PSC comments on the interim rule, available at: <http://www.pscouncil.org/pdfs/ITAA-PSC%20IFR%20Comments.pdf>.

⁴ 71 F.R. 33148 (June 8, 2006), column 1.

government agencies and the companies that are encouraged to promote the development and deployment of anti-terrorism technologies.

There are several provisions of the final rule that bear mention and we particularly support. The Department has been consistently clear, and reasserted in this final rule, that services are fully covered by the Act and are eligible for SAFETY Act coverage.”⁵ The Department has restated its intent to assert “appropriate exemptions” to protect proprietary information submitted by companies during the application process,⁶ although we hope that the Department would be forthcoming with broad statistical information about the program, such as how many applications have been received and how many rejected, without disclosing applicant names or even technologies being addressed. The Department has clarified the scope of its SAFETY Act coverage by allowing for “Block Designations” and “Block Certifications” for groups of technologies,⁷ and creating a new category of coverage—Developmental Testing and Evaluation (DT&E)—with limited SAFETY Act coverage, that should facilitate the deployment of promising anti-terrorism technologies in the field either for test and evaluation purposes or in response to exigent circumstances.⁸

But as the program continues to be a work in progress, so too are these final regulations. In fact, as part of this final rule, the Department has specifically asked for comments on how the Department can and should address changes in insurance availability⁹ and on the operation of the new DT&E designations.¹⁰ PSC is developing comments on these two elements of the final regulations and anticipates submitting them to the Department in the near future.

At the same time, there are additional steps for the Department to take, such as issuing the streamlined application kit, so that companies can take full advantage of the new flexibilities and address the relationship to federal and other procurement opportunities. Another issue that needs further discussion about implementation, but probably not more SAFETY Act regulations, is the relationship between the SAFETY Act and the extraordinary contractual relief available for federal procurement opportunities under P.L. 85-804.¹¹

The Application Kit

On August 16, 2006, the Department issued the revised application kit to implement the final rule.¹² Even though the Department has not yet received the necessary information collection approval from OMB for the new kit, the Department is directing new applicants to exclusively use the new application kit; applicants who registered with the Department prior to August 16 may continue to use the earlier version of the application kit.

⁵ See 71 F.R. 33154 (June 8, 2006) column 2.

⁶ See 71 F.R. 33151 (June 8, 2006) column 2 and Section 25.10 of the final regulations.

⁷ See 71 F.R. 33156 (June 8, 2006) column 3 and Section 25.9(j) of the final regulations.

⁸ See 71 F.R. 33156 (June 8, 2006) column 2 and Section 25.4(f) of the final regulations.

⁹ See 71 F.R. 33149 (June 8, 2006) column 2.

¹⁰ See 71 F.R. 33156 (June 8, 2006) column 3.

¹¹ See 71 F.R. 33154 (June 8, 2006) column 3.

¹² Available at:

[https://www.safetyact.gov/DHS/SAActHome.nsf/23158AD7D420AEDB852571C70056BE33/\\$FILE/Application%20Kit%20Version%202.pdf](https://www.safetyact.gov/DHS/SAActHome.nsf/23158AD7D420AEDB852571C70056BE33/$FILE/Application%20Kit%20Version%202.pdf) .

We have reviewed this new application kit and intend to submit comments to both the Office of Management and Budget and the Department on the updated application kit by the October 16 deadline for the submission of comments. By and large, we support the new kit. In our view, it is consistent with the June 2006 final rule and includes relevant application forms for the new Block Designation, Block Certification, and DT&E designation. This kit is more user-friendly than the December 2004 version;¹³ it addresses further the concerns PSC raised to the Department and OMB's Office of Information and Regulatory Affairs on February 10, 2005 about that earlier version of the kit, particularly with respect to the quantity of highly proprietary financial information required of applicants.¹⁴

Yet there are still some lingering concerns even with this kit. To be sure the application forms are clearer and more logically arranged and this will be a benefit to applicants. The amount of financial information that is required with the initial application appears to be minimized. But we do not believe that the request for information under this kit will be significantly less than the amount of information previously required. In fact, new to this version of the application for Designation under Chapter 4 of the kit, is the instruction relating to past sales and ongoing procurements; it requires that an applicant "attach a copy of any request for proposal or broad agency announcement that led to the award and a copy of the applicant's final proposal and statement of work."¹⁵ In addition, while there is more information on how to properly and fully complete the application forms, we believe that the new kit places tougher standards for the Department to find an applicant complete.

Furthermore, we requested and expected a significantly streamlined application kit, particularly when seeking to match the application process with an on-going federal procurement. On September 6, 2005, PSC and four other associations jointly developed and submitted to DHS former Under Secretary McQueary, a proposed streamlined application kit and instructions.¹⁶ In this 2006 version of the application kit, the Department makes a reference to a streamlined application process in connection with Block Designations,¹⁷ but we do not view that single reference in one section as meeting our expectation.

We look forward to further discussions with the Department on our comments on this kit and moving toward a true streamlined application process.

DHS staff support for the SAFETY Act

On a related matter, we strongly recommend that the Department continue to provide the necessary infrastructure support for the Office of SAFETY Act Implementation (OSAI) and its activities. Our members have appreciated the responsiveness of the OSAI, Science and Technology (S&T) and General Counsels' offices to requests for information and to processing applications. We would hope that, in the near future, the OSAI would have a permanent director

¹³ See 69 F.R. 72207 (December 13, 2004).

¹⁴ See PSC February 10, 2005 letter to DHS and OIRA, available at: <http://www.pscouncil.org/pdfs/SAFETYActApplication2-10-05.pdf>.

¹⁵ See the Instructions for Designation D6.2 at page 34-35.

¹⁶ See September 6, 2005 Joint letter from PSC, Aerospace Industries Association, Information Technology Association of America, National Defense Industrial Association and U.S. Chamber, available at: <http://www.pscouncil.org/pdfs/McQuearySAFETYActKitLetter.pdf>.

¹⁷ See the Chapter 7 Block Designation Application at page 67.

and be staffed with a sufficient number of federal employees to handle the expected increase in requests for information, growth in applications, and demands for being a resource to other federal agencies who need information on the Act and its processes, particularly in relationship to planned or on-going procurements.

Addressing the Procurement Processes

The SAFETY Act protections are relevant only when applied to a specific anti-terrorism technology. Thus, the relationship between the SAFETY Act and the procurement of those technologies is critical. Certain aspects of that relationship vest in the SAFETY Act regulations; other aspects must be addressed in the federal procurement regulations. Still other provisions must be covered in the procurement processes of other purchasers—state, local, or commercial.

Through September 6, 2006, the Department has already issued 62 Certifications and 22 Designations.¹⁸

To its credit, the June 2006 final SAFETY Act regulations recognize the importance of aligning the SAFETY Act process with planned and on-going federal procurement and the procurement processes of others.¹⁹ For example, these final rules establish a flexible approach for coordinating consideration of a SAFETY Act application with the procurement process by allowing a government agency to seek a preliminary “Pre-Qualification Designation Notice” with respect to a technology to be procured, stating that the technology to be procured either affirmatively or presumptively satisfies the technical criteria necessary to qualify under the Act.²⁰ The regulations provide that selected vendors chosen to provide the technology will receive expedited review of their application for designation, be deemed to have satisfied the technical criteria for SAFETY Act Designation with respect to that technology, and be authorized to submit a streamlined application as set forth in the pre-qualification designation notice.²¹ We strongly support this approach. Even though the information required to be submitted would vary on a case-by-case basis, we strongly recommend that this Pre-Qualification Designation Notice be incorporated into the application kit instead of being totally outside it.

In addition, the final regulations addressed the deference due to other federal or state regulatory or procurement officials.²² As the background information and the regulations provide, the level of deference due to other government officials will depend on the nature of such officials’ review.

Beyond the SAFETY Act regulations, we have long asserted that companion regulatory coverage must be included in the Federal Acquisition Regulation and, if necessary, in the Department’s own Homeland Security Acquisition Regulations. For example, when the Department published its interim acquisition regulation on December 4 2003, PSC’s written comments on that rule

¹⁸ See SAFETY Act website: <https://www.safetyact.gov/>, last visited on September 6, 2006.

¹⁹ See 71 F.R. 33156 (June 8, 2006) column 1.

²⁰ See 71 F.R. 33163 (June 8, 2006) column 3 and Section 25.6(g) of the final regulations.

²¹ See the “Pre-Qualification Designation Notice on www.safetyact.gov. Section 25.6(g)(4)(iii) of the regulations provides that the Pre-Qualification Designation Notice will provide a list of the portions of the application information in Section 25.6(a) that the selected vendor(s) must complete and submit in order to obtain Designation.

²² See 71 F.R. 33157 (June 8, 2006) column 2 and Section 25.4(viii) of the final regulations.

specifically noted the absence of any SAFETY Act coverage applicable to the Department's own procurement.²³ In the Department's May 2, 2006 final acquisition regulations, the Department acknowledged that SAFETY Act coverage is appropriate and will be considered when the Federal Acquisition Regulation is issued.²⁴

We do not yet know the status or content of the Federal Acquisition Regulations (FAR). In 2003, PSC and other organizations wrote to the Office of Federal Procurement Policy urging the FAR Council to develop and publish for comment the necessary government-wide acquisition policy regulations. The FAR Council established a case number but took no action on the rule, awaiting the final SAFETY Act regulations. The FAR Council closed the prior case without action, but on August 23, 2006 opened a new case number (2006-023) based on the strawman draft submitted by the Department's Chief Procurement Officer.²⁵ This is an important next step to fully effectuate the SAFETY Act. Once the FAR rule is in place (or even pending that final rule), it may be necessary or appropriate to supplement the FAR with coverage in the Department's own acquisition regulation.

Once the final acquisition regulations are in place, the next critical step is to provide necessary training to the federal acquisition workforce and others. We believe both the DHS acquisition staff and the OSAI staff recognize the importance of such training and have indicated a willingness to initiate that training at the earliest opportunity. PSC, and I am sure my colleagues at the other associations that we have worked in partnership with over the years on the SAFETY Act, will offer our assistance wherever appropriate.

Fortunately, the Department has not waited for the final rule or for the acquisition regulations to begin applying the SAFETY Act protections to its own significant procurements. For example, the three DNDO Advanced Spectroscopic Program (ASP) awards that the Department made earlier this year include SAFETY Act coverage. The significant SBI.net procurement now under review by the Department includes specific provisions to address SAFETY Act coverage. Finally, to address the emerging challenges of liquid-based explosives, the Department issued a Request for Information for recommended technology approaches, with SAFETY Act coverage addressed as part of it.²⁶

Regrettably, we do not have any visibility into the application of SAFETY Act coverage in other federal agency procurements. Even less visibility exists on the extent to which the SAFETY Act has been used in state, local or commercial applications. However, since the Department makes significant grants to first responders and state and local governments for a wide range of homeland security matters, we can well envision that many of the products and services acquired with these grant funds would be interested in and eligible for SAFETY Act coverage. We encourage the Department to share with the Congress and the public the extent to which the SAFETY Act is being used in these circumstances.

²³ See PSC comment on the DHS interim procurement regulations, available at: <http://www.pscouncil.org/pdfs/ITAA-PSC%20IFR%20Comments.pdf>.

²⁴ See 71 F.R. 25759;65 (May 2, 2006)..

²⁵ See FAR Council Status of Cases, available at <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>, as of September 1, 2006.

²⁶ See liquid explosive RFI available at: <http://www.fbo.gov/spg/DHS/OCPO/DHS-OCPO/HSQDC%20BAA%2006%200063/SynopsisP.html>, last visited September 7, 2006.

Conclusion

Mr. Chairmen, it has been almost four years since the Congress took the significant step in the Homeland Security Act to enact the SAFETY Act. In our view, the law is intended to be a “gas pedal” that is designed to accelerate the deployment of anti-terrorism technologies; the procedural issues relating to the SAFETY Act should not be a “brake” on the applicant. Over the past three years, we have seen interim regulations, and now a final rule, preliminary and then an interim and now a final application kit, and other related implementation actions. Those early SAFETY Act applicants helped test the process and the information required to be submitted to assist the Department in deciding appropriate coverage. We have significantly advanced that process in the last few weeks with the final regulation and application kit. Hopefully, over the next few months, we will see the final Federal Acquisition Regulation and any related DHS acquisition regulation coverage. Simultaneously, critical procurements are taking place where the SAFETY Act coverage could be the difference in a successful procurement.

PSC has been involved in the SAFETY Act process from the beginning and we intend to remain active in the future to make the process clear and its utilization as robust as possible. We particularly appreciate this Committee’s bipartisan attention to the Act and to the Department’s administration of the Act. Unquestionably your interest has helped to move this process forward.

Thank you again for opportunity to testify. I would be pleased to respond to any questions you have.

STATEMENT REQUIRED BY HOUSE RULES

In compliance with House Rules and the request of the Subcommittee, in the current fiscal year or in the two previous fiscal years, neither I nor the Professional Services Council, a non-profit 501(c)(6) corporation, has received any federal grant, sub-grant, contract or subcontract from any federal agency.